Office-Supreme Court, U.S.
FILED
FEB 12 1965
JOHN F. DAVIS, CLERK

No. 614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THEODORE SPECTOR,
Petitioner,

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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PETITION FOR REHEARING

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February 12, 1965

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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PETITION FOR REHEARING

The petitioner herein respectfully applies for a rehearing of this Court's order of January 18, 1965, denying the petition for a writ of certiorari to review the judgment of the Court of Claims. In support of this application, petitioner states as follows:

1. The Violation of the Executive Order

The first question raised by the petition was whether an administrative construction, unauthorized and unratified by the President, can justify a violation of the plain words of an Executive Order. The President decreed in Executive Order 10590, as reconfirmed by Executive Or-

der 10925, that the federal employee anti-discrimination program shall be administered within each department and agency by an Employment Policy Officer who is "outside of the division handling the personnel matters of the department or agency concerned." No exceptions to that command are authorized by the Executive Order.

The flagrance of the administrative misconstruction and misapplication of that executive language now appears even greater than indicated in the petition for certiorari. The impact of such misconstruction and misapplication affects far more than the Department of the Interior or this petitioner. So calculated is the effort to amend the Executive Order by administrative interpretation and so universal is the resulting evil with respect to federal personnel that a reconsideration of the order denying certiorari appears appropriate.

On July 22, 1961, more than two years *after* the institution of this suit in the Court of Claims, when this matter was brought into focus, the President's Committee on Equal Employment Opportunity issued rules and regulations. 5 C.F.R. § 1401.3(b); 26 F.R. 6579. The relevant portion of those rules constitutes a patent amendment of the controlling Executive Order:

Executive Order 10590, Sec. 5:	**5 C.F.R. § 1401.3(b):**
"The position of Employment Policy officer shall be established outside of the division handling the personnel matters of the department or agency concerned."	**"The positions of the Employment Policy Officer and Deputy Employment Officer shall be established outside the division handling the personnel matters of the department or agency concerned *unless prior approval is received from the Executive Vice Chairman* [of the President's Committee]." Emphasis added.**

And at least three of the departments and agencies have codified this effort to amend the Presidential decree in their own rules and regulations:

(1) The Department of Justice on March 21, 1962, established a rule that the position of its Employment Policy Officer "shall be established outside of the Administrative Division or any other organizational unit of the Department handling personnel matters of the Department unless prior approval is received from the Executive Vice Chairman." 28 C.F.R. § 42.4.

(2) The Post Office Department on March 30, 1962, promulgated a rule that "The Assistant Postmaster General, Bureau of Personnel, is the Employment Officer for the Post Office Department." 39 C.F.R. § 201.90(b).

(3) The Securities and Exchange Commission on November 30, 1961, issued a regulation that the position of Employment Policy Officer "shall be established outside the office handling the personnel matters of the Commission unless prior approval is received from the Executive Vice Chairman." 17 C.F.R. § 200.92.

Hence the informal approval given the Department of the Interior's designation of its Administrative Assistant Secretary in charge of personnel matters as Employment Policy Officer—an approval found to be decisive by the Court of Claims in this case—has been codified and recodified by administrative fiat. And yet not one syllable of authorization for formally or informally approving such a designation can be found in the controlling Executive Order.

Indeed, the very effort in these regulations to sanction violations of the plain words of the Executive Order through the "approval" of the Executive Vice Chairman constitutes an implied recognition of the force of petitioner's reading of the Executive Order. If the Administrative Assistant Secretary in charge of personnel of a department were truly "outside of the division handling the personnel matters"—as the Government here urges—there would be no occasion to seek to permit his designa-

tion through the "approval" of the Executive Vice Chairman. The position of the Justice Department as revealed in its own regulation is thus at odds with its position before this Court.

As the Court of Claims conceded (Pet. App. 6), if "we were to look only at the words of the Executive Order, we might perhaps agree with plaintiff that the Administrative Assistant Secretary was too close to the run of personnel decisions within the Department to be a proper Employment Policy Officer." But the critical and as yet unanswered question is how, in light of the Executive Order, such a person can be designated Employment Policy Officer with the approval of the Executive Vice Chairman or any other officer of the President's Committee. No authority to give such approval can be derived from the Executive Order.

The serious nature of this problem is now apparent. The entire federal employee anti-discrimination program is saddled with an administrative defiance—approved by the Court of Claims—of the plain words of the Executive Order. The very language of that Order which was designed to give federal employees assurance that their discrimination complaints would be handled by some one other than those dealing with personnel matters (the very ones whose actions were allegedly discriminatory) is now a dead letter unless review is granted by this Court.*

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* The contention of the United States (Opp., p. 8) that even if petitioner is correct in his reading of the Executive Order he was not prejudiced since there was evidence to support his removal on incompetency grounds misses the whole point. The existence of evidence of incompetency cannot justify discriminatory action by those dealing with the incompetency charges. Nor can it justify a violation of the procedural safeguards of the Executive Order in question.

Moreover, the presence or absence of such evidence is not an issue before this Court, nor was it an issue before the Court of Claims. Whether or not the evidence was adequate is thus a matter of conjecture.

The time is ripe to reaffirm in this highly significant context the rule that administrators cannot ignore the plain words of an Executive Order and make their act "legal by doing it and then invoking the doctrine of administrative construction to cover it." *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 136. They are not free, under this Court's rulings, to ignore plain limitations on their authority. *Peters* v. *Hobby*, 349 U.S. 331, 345.

2. The Other Issues

Petitioner reiterates the other questions presented in the petition—the absence of authority in the Secretary of the Interior to remove attorneys, and the unfairness of the hearing board composed largely of non-lawyers—as warranting reconsideration of the order denying certiorari. Nothing that the Government said in opposition to the petition detracts from the importance of those questions or the need for their review.

Indeed, the effort of the Government to justify the hearing procedure by reference to the absence of any "right" to a hearing and the absence of any charge that the board was not impartial only adds to the seriousness of that issue. The fact that petitioner had no absolute "right" to a hearing does not obviate the necessity of fairness once a hearing is granted him. Cf. *Wieman* v. *Updegraff*, 344 U.S. 183, 191; *Gonzalez* v. *Freeman*, 334 F.2d 570, 574 (App. D.C.). Nor should the failure to challenge the impartiality of the board detract from the seriousness of a challenge to its competence. Cf. *Eubanks* v. *Louisiana*, 356 U.S. 584. Thus the conflict, noted in the petition (p. 18), between the principles followed below and those approved by this Court in *United States* v. *Merz*, 376 U.S. 192, 198-199, remains complete and unanswered.

Finally, the conflict between the decision below and the *Accardi*, *Service* and *Vitarelli* decisions of this Court

(Pet., p. 14) as to the failure of the Secretary of the Interior to respect his own delegation of power to remove attorneys remains unaltered. The Government's reiteration (Opp., pp. 6-7) of the Court of Claims statement that the Secretary retained all his powers as head of the Department cannot destroy the fact that as of the time of this case he had effectively delegated all such removal power to the Solicitor. He was bound to respect that delegation whatever his ultimate power to revoke or amend the delegation. Otherwise the principle that a governmental official must obey his own published dictates is set at naught.

CONCLUSION

For these reasons, as well as those set forth in the petition, the order of January 18, 1965, denying certiorari should be vacated and review granted of the decision below.

Respectfully submitted,

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Counsel for Petitioner

February 12, 1965

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

EUGENE GRESSMAN